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In the

Supreme Court of the United States

October Term, 1970

No.

HARVEY LEE DAVIS,

Petitioner,

v.

THE MEMBERS OF SELECTIVE SERVICE BOARD NO. 30 OF DALLAS, TEXAS, THE UNITED STATES ARMY, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the United States Court of Appeals for the Fifth Circuit:

Petitioner Harvey Lee Davis prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on November 5, 1970.

OPINIONS BELOW

The opinion of the Court below is reported in 433 F. 2d 736 (5th Cir. 1970). It is reproduced as Appendix A herein. The District Court opinion is reproduced as Appendix B herein and also on pages 42, 43, Appendix to the Brief.

JURISDICTION

The opinion and judgment of the Court below were entered on November 5, 1970. Petitioner's motion for rehearing and motion for rehearing En Banc was denied on February 1, 1971. Jurisdiction of this Court is envoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Is a registrant entitled to pre-induction relief when he presents a prima facia case for conscientious objector classification the truth of which is unrefuted in his file but the Local Draft Board unlawfully refused to reopen his classification?

Does Selective Service regulation, 32 C.F.R. § 1625.2, preclude a local board from considering a registrant's claim of conscientious objection because it crystallized after the board ordered the registrant to report for induction? (This is the same question before this Court in *Ehlert v. United States*, 422 F. 2d 322 (9th Cir. 1970) cert. granted 397 U.S. 1074 (1970).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

50 U.S.C. App., Section 456(j):

> "(j) Conscientious Objectors. — Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Military Selective Service Act, 81 Stat. 104, Section 10 (b) (3) reads in pertinent part as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Selective Service Regulations, 32 C.F.R. Section 1625.2:

> "The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a

change in the registrant's status resulting from circumstances over which the registrant had no control."

STATEMENT OF THE CASE

Petitioner, a Selective Service registrant, was a member of the Peace Corps serving his country in that capacity in the small town of Jaen, Peru, under a two-year contract with the Peace Corps, beginning in September 1968. While in Peru, Petitioner received his notice of induction from his Dallas draft board on February 26, 1969, ordering him to report for induction on March 21, 1969. The date of induction was subsequently postponed until September 30, 1969. Petitioner continued his Peace Corps work among the poor Peruvian peasants. On September 15, 1969, the Board ordered petitioner to report from Peru to the Dallas induction station for induction on October 15, 1969. Petitioner returned to the United States and on October 7, 1969, informed the Board that he had become a conscientious objector to all wars and requested Form 150. The Board furnished petitioner with said form commanding that it be returned to the Board on or before October 13, 1969. Petitioner completed the form with supporting statement and documents showing the circumstances and events beyond his control causing his views to crystallize and become a conscientious objector during the *seven months* after he received his notice for induction and the time he filed his 150 Form as a conscientious objector (Appendix pp. 7-14). Petitioner respectfully requests the Court to read his statement beginning at page 7 in the Appendix to the brief.

On October 22, 1969, Davis appeared before the Board for a personal interview. At the conclusion of the interview the Board refused to *reopen Petitioner's classification* stating that it was the decision of the Board that insufficient new information was presented by petitioner to justify the reopening of his classification. The Board made no finding or determination as to when and in what circumstances Petitioner's beliefs and conscientious objection to war matured.

Registrant brought a civil suit against the Board, the United States Army and the United States of America seeking injunctive relief in the form of a court order setting aside the Board's induction order on the basis that the Board had *illegally refused to reopen registrant's classification* and such refusal was in violation of Selective Service regulations and statutes.

The United States attorney on behalf of all defendants filed a motion to dismiss for lack of jurisdiction. The Trial Court treated the motion to dismiss as a motion for summary judgment. The Trial Court held it had jurisdiction to grant Petitioner pre-induction relief on the authority of *Oestereich v. Selective Service System*, 393 U. S. 233 (1968). The Trial Court granted defendant's motion for summary judgment on the basis that the Board was not required to reopen Petitioner's case because Petitioner made his request for reopening after he had received an order of induction. The Trial Court considered it was bound by the authority in the Fifth Circuit, *Davis v. United States*, 374

F. 2d 1 (5th Cir. 1967) holding such facts did not present for consideration of the Board "circumstances over which the registrant had no control." (Appendix B page B-1 herein). This Court had not granted certiorari in *Ehlert* at that time.

The Court of Appeals for the Fifth Circuit held the Trial Court lacked jurisdiction to enjoin the induction and affirmed the judgment. (Appendix A)

REASONS FOR GRANTING THE WRIT

The issues raised by this case are (1) whether the unlawful actions of a local draft board, condemned by this Court in *Mulloy v. United States*, 390 U.S. 410 (1970) deprives a registrant of such an essential procedural right as to entitle him to pre-induction judicial review, and (2) whether a claim of conscientious objection which has matured after a local board has ordered the registrant to report for induction can be considered by the board.

With respect to the first issue the Court of Appeals below has rendered a decision in conflict with decisions of the Court of Appeals for the Third Circuit and this Court's opinion in *Oestereich v. Selective Service System*, supra.

The second issue is presently before this Court in *Ehlert v. United States*, 422 F. 2d 322 (9th Cir. 1970) cert. granted 397 U.S. 1074 (1970). The factual circumstances in this case are much stronger than those in *Ehlert* because Petitioners beliefs matured during the *seven* months after he received his notice of induction.

The questions that arise in this case will persist in arising until this Court resolves the conflicts between the Courts of Appeal. A Writ of Certiorari should be granted to resolve these conflicts and to determine whether the principals of *Oesterich* should apply under these circumstances.

A. Petitioner Is Entitled To Pre-Induction Review Because The Local Board's Arbitrary Refusal To Reopen Petitioner's Draft Classification Was In Violation Of Statutory And Administrative Regulations.

This Honorable Court's consideration of § 10(b) (3) of the Selective Service Act in *Oestereich v. Selective Service System Local Board*, 393 U.S. 256 (1968) in essence was that jurisdiction to entertain a particular pre-induction claim depends on whether the board's action is challenged as *lawless* because without statutory basis as in *Oestereich*, supra, and *Breen v. Selective Service Local Board*, 396 U.S. 460 (1970), or simply as improper because an erroneous determination of a matter over which the board has authority to decide as in *Clark v. Gabriel*, supra.

Harvey Lee Davis alleged several lawless actions of the board including:

(1) That the Board violated Regulation 32 C.F.R. Sec. 1625.2 when the Board *refused to reopen his classification* after Davis showed a change in circumstances over which he had no control by submitting *new evidence, unrefuted from any source*, that his convictions of conscientious objection had crystallized after his notice of induction. (Appendix to the Brief p. 2, 3)

(2) Davis also alleged that the Board recorded in its minute records that "insufficient new information (was) presented to justify the *re-opening* of classification." Prior to Davis' filing Form SS 150 with its supporting affidavit, no information pertaining to conscientious objections was before the Board nor had any such information ever been before the Board and therefore, the Board had made its decision not to *reopen* Davis' classification either on a consideration (evidence) outside of the record or that the minute entry reading "insufficient new information presented to justify re-opening of classification" was incorrect (Appendix p. 3, 4 and 17). Under either alternative the refusal to reopen Davis' classification was illegal.

(3) The record shows on its face that the Board failed to specifically find whether there had been a change in Davis' status resulting from circumstances over which he had no control under 32 C.F.R. § 1625.2. The Board made no finding whatsoever as to when Davis' beliefs matured. Under the above Regulation, the Board, in order to preclude reopening Davis classification was required to first determine when Davis' beliefs matured. When it failed to make such a determination the board either failed to follow the regulation or it was considering Davis' request for reopening his classification without reference to the above regulation. Under either alternative the refusal to reopen Davis' classification was illegal because the Board failed to follow its own administrative regulations.

United States v. Pacheco, 433 F. 2d 914 (10th Cir. 1970) held that when a claim on conscientious objection is asserted

after the order to report, the Board *must* determine when and in what circumstances the registrant's beliefs matured. The duty is on the Board to make the required determination and it must do so specifically. In that case, the board failed to do so and the Court reversed the conviction.

Additional cases holding that the Board is required to make a finding when the registrant's beliefs have crystallized are *United States v. Stafford*, 389 F. 2d 215 (2d Cir. 1968); *United States v. Holmes*, 426 F. 2d 915 (2d Cir. 1970); *United States v. Gardiner*, 310 F. Supp. 364 (D.C.E. D.N.Y. 1970).

Petition urges the above actions of the Board brings his cause within the principles stated by Justice Harlan in *Oestereich:*

> "Second, a challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity, but also presents an issue beyond the competence of the Selective Service Boards to hear and determine. * * *" (393 U.S. at page 242.)
> "To withhold pre-induction review in this case would deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. * * *" 393 U.S. at page 243.

50 U.S.C. App. Section 456(j) grants unqualified exemption to conscientious objectors. This exemption is no less an exemption than the exemption granted to students preparing for the ministry under Section 6(g) of the Selective Service Act.

Therefore, conscientious objectors are entitled to pre-induction relief just as the ministerial student was entitled to relief in *Oesterich* when the conscientious objector challenges the validity of the administrative procedures of the board as Petitioner has done in this case. *Clark v. Gabriel*, 393 U.S. 256 (1968) does not apply to this case because in *Gabriel* there was no allegation of a violation of the board of its own regulations or that any of the regulations were illegal.

Cases directly in point upholding pre-induction judicial review in the situation here presented include *Bucher v. Selective Service System*, 421 F. 2d 24 (3d Cir. 1970) and *Hunt v. Local Board No. 197*, 423 F. 2d 576 (3d Cir. 1970). These casees hold pre-induction judicial review is available where the registrant's complaint was addressed to the Board's *unconstitutional* procedures in refusing to reopen after he gave notice of a prima facia change of conditions entitling him to the reopening of his classification and where the registrant's complaint was *not* addressed to *fact findings* of the Local Board. These precise elements constitute Petitioner's cause.

B. The Court of Appeals Opinion Is In Error Because It Is Not Based On The Jurisdictional Issue Raised By Petitioners Complaint.

Petitioner respectfully points out that Circuit Court's opinion does not correctly state the basic issue raised by Petitioner on which jurisdiction rests. A correct statement of the issue involved is imperative because the nature of

the issue determines the presence or absence of pre-induction jurisdiction. The issue is whether petitioner may enjoin his induction into the United States Army on the ground that the Local Draft Board *illegally refused to reopen* his classification when he presented a prima facia case for a I. O. classification, the truth of which prima facia case is unrefuted in his file. The issue is *not* whether pre-induction relief may be had where the Local Draft Board refused to grant him *status* as a conscientious objector. The Court below in the opening sentence of its opinion states:

> "The issue here is whether appellant may enjoin his induction into the United States Army on the ground that the Local Draft Board illegally refused to grant him *status as a conscientious* objector." (emphasis supplied.) p. 736 (Appendix A, p. A-1)

The opinion below concluded:

> "* * * Here the registrant objects to the *denial of conscientious objector status* by his Local Board which, before making its determination, considered both the written evidence supplied by Davis and also the oral testimony at the personal interview. It is exactly this type of *discretionary* procedure by the Local Draft Board that the Clark v. Gabriel decision held validly exempted from judicial interference through Section 10(b) (3)." (emphasis supplied.) p. 738 (Appendix A. p. A-6)

The above quotations do not correctly state the issue that has been raised by Petitioner. Petitioners complaint objects to the Board's unlawful violation of its regulations and the law by its refusal to *reopen* petitioner's classification. The issue of whether Petitioner should be granted I. O. *status*

has not *yet been reached.* Under this Court's decisions such refusal to *reopen* is not the type of discretionary procedure exempt from pre-induction review under *Oestereich.*

Another factor that may have caused error by the Court of Appeals is its additional incorrect statement of the basis of the holding of the District Court. In the first paragraph of the Court of Appeals opinion it is stated:

> "* * * The District Court denied the injunction by ruling that although appellant was entitled to pre-induction relief he was nonetheless barred from obtaining relief because of his failure to present a prima facia case for reopening of the draft classification. * * *" (page 736, Appendix A, pages A-1, 2)

The District Court judgment first pointed out "the Board would have been obliged to reopen Plaintiff's classification upon a showing by Plaintiff of a prima facia cause" under the authority of *Robertson v. United States,* 404 F. 2d 1141 (5th Cir. 1968) *if he had made his request before he received an order of induction.* (Appendix B. page B-1)

The reason for the District Court's judgment was it felt bound by the authority of *Davis v. United States,* 374 F. 2d 1 (5th Cir. 1967) Because of that authority the Trial Court said Petitioner did not present a prima facia case for reopening:

> "* * * Inasmuch as he made his request for reopening *after* he had received an order of induction from defendant but did not present for consideration of the board "circumstances over which the registrant had no control." (Appendix B page B-1)

So the crucial factor in the District Court's opinion was that although Petitioner alleged a prima facia case for reopening, his case should not be considered by the Board under *Davis*, supra because his request for reopening was after he received an order of induction.

C. The Board's Action Of Refusing To Reopen Petitioner's Classification, Condemned By Mulloy, Should Be Declared Lawless Under The Principles Of Oestereich.

This Court in *Mulloy v. United States*, 398 U.S. 410, (1970) held that because a refusal to *reopen* a classification denies a registrant an opportunity for administrative appeal from the rejection of his claim, an improper refusal wrongfully deprives the registrant of an essential procedural right. *Mulloy* held that where a prima facia case for reclassification has been been made the board may not deprive the registrant of an administrative review by simply refusing to reopen his file. This Court stated:

> "Where a registrant makes non-frivolous allegations of fact that have *not been previously considered by his board, and* that, if true would be sufficient under regulation or statute to warrant granting the requested classification, the *board must reopen the registrant's classification unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file.* See *United States v. Burlich*, D. C. 257 F. Supp. 906, 911. For in the absence of such refutation there can be no basis for the board's refusal to reopen except an evaluative determination adverse to the registrant's claim on the merits. And it is just this sort of determination that connot be made without affording the registrant a chance to be heard and an opportunity for an administrative appeal.

No facts concerning Petitioner's conscientious objections had been previously considered by the Board and there was and is nothing in Petitioner's file refuting the truth of his allegations.

Mulloy further stated:

> "*Because of the narrowly limited scope of judicial review available to a registrant, the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System. Where a prima facia case for reclassification has been made, a board cannot deprive the registrant of such review by simply refusing to reopen his file.* Yet here the board did precisely that. For it is clear that the petitioner's SSS Form 150 and the accompanying letters constituted a prima facia showing that he met the statutory standard for reclassification as a conscientious objector. * * *" (emphasis supplied)

Petitioner's Board did precisely what the board did in *Mulloy*. It simply refused to reopen Petitioners file and deprived him of his right to full administrative review.

The decision in *Mulloy* makes it clear that a draft board does not have *authority to refuse to reopen* a registrant's file upon presentation of a prima facia case for reclassification. Such refusal to reopen should be held *lawless* within the meaning of *Oestereich*. Here the Local Board wrongfully refused to reopen Davis' classification despite its awareness he had presented entirely new and unrefuted allegations showing a prima facia claim to I.O. classification.

In *Robertson v. United States*, 404 F. 2d 1141 (5th Cir. 1969) it was said because the scope of judicial review of a

local board is the narrowest known to law, it is imperative that the Selective Service System faithfully follow its own procedures. It noted that a basic tenant of the regulation is that "no classification is permanent."

Robertson also said that while the regulations provide only that the board "may" reopen a classification on receipt of new evidence it was decided in *Olvera v. United States*, 223 F. 2d 880 (5th Cir. 1955) that the local board *may not exercise its discretion not to reopen.* The Court stated:

> "If the registrant submits new information "not considered when the registrant was (originally) classified, which, if true would justify a change in the registrant's classification (i. e., if he presents a prima facia case for reclassification) the board has a duty to reopen his case." p. 1146 (emphasis supplied)

In this case just as in *Robertson* the Board certainly refused to reopen Davis' classification. Instead it considered whether or not he should be reclassified and having decided that he should not, refused to reopen his classification. This decision in itself denied Harvey Davis important avenues of appeal. This is the precise unlawful conduct condemned in *Mulloy, Robertson* and *Olvera.*

Davis' claim of conscientious objection, although raised for the first time after receipt of an induction notice, clearly was based on a claim which had not previously matured. Therefore, it would be improper to conclude that Davis could not be a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice. *United States v. Gearey*, 368 F. 2d 144 (2d Cir.

1968) cert. denied 389 U.S. 959, *United States v. Long*, 435 F. 2d 830 (10th Cir. 1971), *United States v. Nordloff* (7th Cir. 1971) (opinion not yet printed but apparently overrules *Porter v. United States*, 334 F. 2d 792 (7th Cir. 1964). The above cases hold that the crystallization of conscientious objector beliefs would be a "a change in the registrant's status resulting from circumstances over which the registrant had no control," 32 C.F.R. § 1625.2. This view would justify the Board's reopening of Davis' file. Since the reopening was justified, there is nothing to distinguish a request for reopening made prior to the notice of induction and one made after the notice. The rationale of *Mulloy v. United States*, supra, applies to both situations.

The Board may have decided that since Davis' request was subsequent to his notice for induction, it need not reopen his file even if he presented a prima facia case of conscientious objecting maturing after notice. More likely, the Board may have decided that even if Davis did present such a claim the Board could make a determination on the merits without having to reopen his file and afford him the right to an administrative appeal. This the Board is not authorized to do under the rationale of *Mulloy*, *Robertson* and *Olvera*, supra.

Welsh v. United States, 398 U.S. 333 (1970) in construing 50 U.S.C. App. § 456(j) giving statutory exemption to conscientious objectors held:

> "That section exempts from military service all those whose consciences spurred by deeply held moral, ethical, *or* religious beliefs would give them no rest or peace

> if they allowed themselves to become part of an instrument of war."

Welsh has established that "religious belief" includes purely ethical or moral beliefs that are deeply and sincerely held by an individual, even though they are purely ethical or moral in source when those beliefs impose upon him the duty of conscience to refrain from participating in any war at any time.

Welsh establishes that "religious conviction and belief" is no longer the only criteria for determining conscientious objector status. Therefore, under *Welsh* the refusal of the Board to reopen Davis' file because he "did not present sufficient proof of religious conviction and belief" applies an incorrect basis for the determination of conscientious objector status.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully prays that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HARVEY L. DAVIS,
3315 Daniels Ave.,
Dallas, Texas,

H. AVERIL SWEITZER,
2405 Cedar Springs,
Dallas, Texas 75201,
Attorneys for Petitioner.

APPENDIX A

A-1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29078

HARVEY LEE DAVIS,
Plaintiff-Appellant,

versus

THE MEMBERS OF SELECTIVE SERVICE BOARD NUMBER 30 OF TEXAS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(November 5, 1970)

Before GEWIN, MORGAN and ADAMS*,
Circuit Judges.

PER CURIAM: The issue here is whether appellant may enjoin his induction into the United States Army on the ground that the local draft board illegally refused to grant him status as a conscientious objector. The district court denied the injunction by rul-

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*Of the Third Circuit, sitting by designation.

ing that although appellant was entitled to preinduction relief he was nonetheless barred from obtaining relief because of his failure to present a prima-facie case for reopening of the draft classification. We affirm the decision of the trial court but for different reasons than those set out in its opinion.

Harvey Lee Davis received his order for induction on February 26, 1969, while serving with the Peace Corps in Peru. Pursuant to his request Davis was granted a seven-month postponement of induction by the State Director of Selective Service, Austin, Texas. At the expiration of the postponement period on September 15, 1969, Davis was again ordered to report for induction on October 15, 1969, whereupon he notified the local board[1] that he desired classification as a conscientious objector. The draft board promptly mailed Davis the appropriate form[2] which he filled out stating that his work with the impoverished Peruvians had brought on a religious conviction which prevented his participation in war.

Following a second postponement of induction, the draft board considered Davis' written application and conducted a personal interview with him, and unanimously concluded on October 22, 1969, that Davis had not presented sufficient proof of religious conviction and belief to justify granting classification as a conscientious objector.[3] Another order was then issued

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[1]Local Board No. 30, Dallas, Texas.

[2]Selective Service Form No. 150.

[3]Using the specific draft board terminology one who entertains a valid conscientious objection to participation in war is classified "I-O".

requiring Davis' induction on February 25, 1970, and it is the enforcement of this decree that appellant seeks to enjoin by claiming that the board was in fact presented with sufficient evidence to warrant the conscientious objector classification and also that there was a denial of procedural fairness.

Under Section 10(b) (3) of the Military Selective Service Act, 50 U.S.C. App. § 460(b) (3),[4] Congress limited judicial review of the local board's classification process to instances where the prospective draftee has either submitted to induction or responded negatively to an order to report for induction.[5] This court must decide, therefore, whether we have jurisdiction to pass upon Davis' alleged erroneous classification procedure when he has neither submitted to nor refused induction.

The effect of § 10(b) (3), supra, on preinduction

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[4] 50 U.S.C. App. §460(b) (3) states in pertinent part that "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards or the President, except as a defense to a criminal prosecution under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction."

[5] The proper method of obtaining court examination of the classification procedure after induction is the writ of habeas corpus, while if the registrant refuses induction he may assert the alleged erroneous procedure in defense to a criminal prosecution instituted under Section 12 of the Military Selective Service Act, 50 U.S.C. App. §462(a). This section provides that "any person who . . . shall knowingly fail . . . or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both".

judicial relief was delineated by the Supreme Court in two cases decided on the same day, December 16, 1968. *Clark* v. *Gabriel*, 1968, 393 U.S. 256; *Oestereich* v. *Selective Service Board No. 11*, 1968, 393 U.S. 233. In *Oestereich*, supra, the local draft board revoked the registrant's statutory classification as a divinity student[6] because of his delinquent activity in returning his registration certificate to the government for the purpose of protesting participation by the United States in the war in Viet Nam. The court held that in this case Section 10(b) (3) did not prevent judicial review prior to an acceptance or refusal of induction because:

> "We deal with conduct of a local board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views, or (b) to bear down upon him for his religious views, or (c) to get him out of town so that the amorous interests of a board member might be better served. ... In such instances as in the present one there is no exercise of discretion by a board in evaluating evidence and in determining whether a claimed exemption is desired." 393 U.S. at 237, 238.

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[6]Section 6(g) of the Military Selective Service Act, 50 U.S.C. App. §456(g) exempts students preparing for the ministry from military service.

The actions of the board were further described as depriving the registrant of his statutory exemption in a "blatantly lawless manner".

In the companion case of *Clark* v. *Gabriel,* supra, the court found that it lacked jurisdiction to conduct preinduction review where it was alleged that the registrant's draft board had improperly refused to classify him as a conscientious objector. Oestereich was distinguishable on the grounds that:

> "Here (in *Clark*), by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board'. 50 U.S.C. App. § 456(j) (1964 ed. Supp. III)." 393 U.S. at 258.

The court went on to say that § 10(b) (3) was constitutionally unobjectionable and that preinduction judicial review of discretionary decisions of the draft board must be prevented so that the procedure necessary to provide military manpower will operate as Congress intended, free from litigious interruptions.

Turning to the instant case, it is abundantly clear that the *Clark* v. *Gabriel* mandate applies, and that this court is without power to enjoin Davis' draft board from ordering his induction. Contrary to *Oestereich,*

there is no delinquency finding used by the board to reclassify a registrant, and thus there is an absence of draft board conduct which would rise to the level of being "blatantly lawless". Here the registrant objects to the denial of conscientious objector status by his local board which, before making its determination, considered both the written evidence supplied by Davis and also the oral testimony at the personal interview. It is exactly this type of discretionary procedure by the local draft board that the *Clark* v. *Gabriel* decision held validly exempted from judicial interference through § 10(b) (3).

We therefore hold that this court lacks jurisdiction to entertain appellant's claim for preinduction relief.

For the reasons heretofore stated, the denial of the injunction by the district court is

AFFIRMED.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 5, 1970, 5 Cir., 1970, ____F.2d____).

(February 1, 1971)

Before GEWIN, MORGAN and ADAMS*,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

(Number and title omitted) (Filed: Dec. 17, 1969)

On this the 17th day of December, 1969, came to be considered the motion of Defendant to dismiss Plaintiff's complaint or, in the alternative, for summary judgment. The Court, having considered arguments, authorities and the affidavit of Defendant submitted to it, finds that Defendant's motion for summary judgment is well taken and should be granted.

The Court determines on the authority of *Ostereich v. Selective Service System*, 393 U.S. 233 (particularly the concurring opinion of Mr. Justice Harlan at 240) (1968) and *Townsend v. Zimmerman*, 237 F. 2d 376 (6th Cir. 1956), that plaintiff has alleged facts which, taken to be true, grant him access to pre-induction relief. Therefore 50 U.S.C.A. App. 460 (b) (3) is not applicable to this case insofar as plaintiff has alleged failure of Local Board #30 to act in compliance with Selective Service regulations.

Nonetheless, while the Board would have been obliged to reopen Plaintiff's classification file upon a showing by Plaintiff of a prima facie cause under 32 CFR 16252, *Robertson v. United States*, 404 F. 2d 1141 (5th Cir. 1968), Plaintiff did not present prima facie cause for reopening in as much as he made his request for reopening *after* he had received an order of induction from Defendant but did not present for consideration of the Board "circumstances over which the registrant had not control." 32 CFR 1625.2. *Davis v. United States*, 374 F. 2d 1 (5th Cir. 1967).

The Court concludes that the facts alleged by Plaintiff, taken to be true, do not present instances of noncompliance of Defendant with 32 CFR 1625.2 or 32 C.F.R. 1660.10. Nor are any procedural acts, arbitrary as a matter of law alleged.

It is hereby ORDERED, ADJUDGED and DECREED that Defendant's motion for summary judgment is GRANTED.

/s/ Sarah T. Hughes
United States District Judge

(Seal)

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1531

HARVEY LEE DAVIS, PETITIONER

v.

SELECTIVE SERVICE BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner was classified I–A by his local draft board, and, in February 1969, was ordered to report for induction (Pet. App. A–2). As he was then engaged in Peace Corps activities in Peru, the date of his induction was postponed at his request for seven months; in September 1969, he was ordered to report for induction on October 15, 1969 (Pet. App. A–2). On October 7, 1969, petitioner requested that his local board reopen and consider anew his I–A classification, claiming that, following his receipt of his orders to report for induction in February 1969, his beliefs had crystallized so that he now qualified for conscientious objector (I–O) status (Pet. 4).

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Petitioner's induction date was once again postponed so that the local board could consider his request. On October 22, 1969, following a personal interview, the local board concluded "that Mr. Davis did not present sufficient proof of religious conviction and belief to justify granting a I–O classification and it was therefore the decision of the Board that insufficient new information was presented by Mr. Davis to justify the reopening of his classification" (App. 32).[1] Petitioner was again ordered to report for induction.

He then brought this civil suit in the United States District Court for the Northern District of Texas, seeking to enjoin his induction. The district court, after issuing a temporary stay against induction, entered summary judgment for the government on the ground that a post-induction-notice claim of conscientious objector status did not entitle a registrant to reopening of his classification (Pet. App. B–1). On expiration of the temporary stay (which both the court of appeals and this Court declined to extend), petitioner was ordered to report for induction on February 25, 1970; he failed to report. However, the present case involves only the civil suit for an injunction. No indictment has been returned.

Petitioner appealed the district court's judgment to the court of appeals, which affirmed on the ground that under Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3), it

[1] "App." references are to the printed Appendix filed in the court below, which is on file in this Court.

was "without power to enjoin Davis' draft board from ordering his induction" (Pet. App. A–1, A–5). The court below observed (Pet. App. A–6) that "there is an absence of draft board conduct which would rise to the level of being 'blatantly lawless'" within the limited exception to Section 10(b)(3) enunciated by this Court in *Oestereich* v. *Selective Service Board,* 393 U.S. 233.

1. Petitioner's principal contention is that the local board's refusal to reopen his I–A classification on the basis of a post-notice conscientious objector claim was contrary to the requirements of Selective Service regulation 32 C.F.R. 1625.2, and thus amounted to the type of lawless behavior that this Court held was subject to pre-induction judicial review in *Oestereich* v. *Selective Service Board,* 393 U.S. 233, and *Breen* v. *Selective Service Board,* 396 U.S. 460. Petitioner's major premise has, however, now been rejected by this Court's recent decision in *Ehlert* v. *United States,* No. 120, this Term, April 21, 1971.

2. It appears, in any event, that petitioner's local board did in fact consider his claim and found that his professed views failed to qualify for exemption under the statute. See 50 U.S.C. App. 456(j). Review of such a determination under the applicable "basis in fact" standard is a matter which the statute has reserved to the courts only "after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3); *Clark* v. *Gabriel,* 393 U.S. 256. Thus, since petitioner failed to report for induction

as ordered after he instituted the present proceedings, judicial consideration of his challenge to the validity of his classification was properly deferred to the criminal prosecution for that alleged offense.[2]

3. Since the petitioner has failed to report for induction, the civil suit would now seem to be moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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[2] Petitioner asserts (Pet. 10–13) that a board's action in refusing to reopen after notice should be differentiated from the action it takes in denying him the status sought in the post-notice claim. This, however, ignores the plain language of 32 C.F.R. 1625.2, which precludes a local board from reopening unless it "first specifically finds that there has been a change in the registrant's status * * *," *i.e.*, that he is entitled to the exemption or deferment he seeks. Thus, a post-notice claim is, by the terms of the regulation itself, to be treated differently by local boards than the pre-notice claim discussed by this Court in *Mulloy* v. *United States*, 398 U.S. 410. See *Paszel* v. *Laird*, 426 F. 2d 1169 (C.A. 2). Of course, the question whether the *Mulloy* rationale could somehow be extended to the post-notice situation within the meaning of the regulation is now academic as to conscientious objector claims in view of *Ehlert*. At all events, it is clearly not a proper issue to be resolved in an action seeking pre-induction judicial review.

U.S. GOVERNMENT PRINTING OFFICE: 1971